**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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| EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC,<br><br>Plaintiffs,<br><br>v.<br><br>RUTH HUGHS, in her official capacity as the Texas Secretary of State,<br><br>Defendant. | Civil Action<br><br>Case No. 1:19-cv-01063 |

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS IMPROPERLY WITHHELD BY NONPARTY REPUBLICAN LEGISLATORS**

Plaintiffs Emily Gilby, Texas Democratic Party, DSCC, and DCCC, by and through their attorneys, and hereby move to compel State Representative Greg Bonnen; State Senator Joan Huffman; State Senator Paul Bettencourt; State Representative Valoree Swanson; State Representative Drew Springer; State Representative Candy Noble; State Representative Patrick Fallon; and State Representative Jodie Laudenberg (the "Nonparty Legislators") to produce all subpoenaed documents they have improperly withheld on the basis of "legislative privilege."

First, it is far from clear that the state common law *immunity* of state legislators gives rise to any federal *evidentiary* privilege at all. But, at the very least, courts have also emphasized that any such privilege, if it exists, is exceptionally narrow and must be strictly construed. And, in any event, the general rule is disclosure in the face of an assertion of legislative privilege, *unless* there is a public good or interest in withholding the evidence sought that *transcends* the interest in disclosure. In this case, no such exception applies. Instead, courts have repeatedly held that when the federal interests at stake implicate the one right that is preservative of all others, the fundamental right to vote, any evidentiary state legislative privilege that might exist is superseded.

And in any event, in nearly every instance that the Nonparty Legislators have asserted the privilege here, it is entirely inapplicable. For example, the Nonparty Legislators do not claim that virtually any of the documents withheld were drafted or sent by the Nonparty Legislators themselves, making it unlikely that they contain the Nonparty Legislators potentially protected deliberations or opinions. Instead, across the total of 154 documents that Nonparty Legislators have improperly withheld, the overwhelming majority are documents produced by: (1) legislative aides and staffers—that is, legislative chamber-wide staff, (2) the staff of the specific Nonparty Legislators—including the *personal* calendar invites of one of them, or (3) documents prepared by or communicated with third-party, non-legislative individuals and organizations. Others are exempt from the privilege as a rule, because they were generated *after* HB 1888 passed out of the respective Nonparty Legislator's house, and therefore cannot possibly be deliberative in nature.

Accordingly, Plaintiffs respectfully submit that the Court should order Nonparty Legislators to promptly produce all documents improperly withheld based on legislative privilege.

**BACKGROUND**

This case challenges the recent amendment to Texas's Election Code enacted by House Bill 1888, which, among other things, effectively bans "temporary" or "mobile" early voting in Texas, to the detriment of the voting rights of young, elderly, and disabled Texans. Before HB 1888, county election officials had the discretion to open early voting locations with flexible hours and days, giving them the chance to bring early voting opportunities to as many voters as possible, including thousands of young Texans living on or near college or university campuses and without reliable access to transportation, elderly and disabled voters with limited mobility, and voters living in the most rural parts of our State. The State contends that HB 1888 was passed to avoid local election officials from using temporary polling places as a way to distort the outcomes of

school bond elections, but this is little more than a fig leaf: there were various attempts to amend HB 1888 to attack this narrow, purported problem. But the Legislature rejected these efforts, instead deigning to limit access to the franchise in *all* federal, state, and local elections in Texas.

Plaintiffs' allegations include not only claims that HB 1888 overreached and in so doing burdened Texans' fundamental right to vote, but also claims that the law was enacted with the *intent* to suppress the vote of especially young, but also elderly and disabled Texans, among others, in response to the overwhelming voter turnout in 2018, which included a historic number of young voters. *See* First Am. Compl. ("Compl.") at ¶ 55 ("Texas enacted HB 1888 with the intent and effect of preventing newly-enfranchised young Texans from effectively exercising their right to vote."). And these allegations are most assuredly plausible given data showing that young voters were among the populations best served by temporary early voting locations, *id.* at ¶ 29, the electoral outcomes that resulted from the surge in Texas youth turnout, *id.* at ¶ 30, the tabling of an amendment to HB 1888 that would have maintained temporary early voting for students, among others, *id.* at ¶ 34-35, and the passage of HB 1888 on a largely party line vote, *id.* at ¶ 35.

Accordingly, on January 9, 2020, Plaintiffs issued subpoenas duces tecum on Nonparty Legislators, which sought the following documents:

> TOPIC NO. 1. All records relating to the enactment and implementation of HB 1888, including but not limited to:
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> 1. All documents related to any meeting you participated in regarding HB 1888, including but not limited to, meeting agendas, presentations, notes, minutes, and recordings;
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> 2. All communications between any person and you and/or your employees, staff, agents, or consultants regarding HB 1888, including but not limited to communications with other members of the Texas Legislature, the Secretary of State, and Local Election Officials.
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> TOPIC NO. 2. All records relating to the State's interests in and

> justifications for the enactment of HB 1888.
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> TOPIC NO. 3. All records relating to the presence or absence of Rolling Polling in Texas.
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> TOPIC NO. 4. All records relating to your consideration of any prior legislation that concerns or relates to changing the hours of temporary early voting locations, including Senate Bill 2226 (2019), Senate Bill 966 (2019), House Bill 4535 (2019), House Bill 1462 (2017), and House Bill 2027 (2015).

On February 11, Assistant Attorney General Michael R. Abrams responded on behalf of all Nonparty Legislators, objecting to all requests, producing certain publicly-available documents, and producing privilege logs for seven of the eight Nonparty Legislators. Specifically, Nonparty Legislators asserted the federal "legislative privilege" in response to each topic. Ex. A. In addition, each Nonparty Legislator's privilege log withheld documents on the exclusive basis of "Legislative Privilege."

In total, Sen. Bettencourt withheld 59 documents, Ex. B, Rep. Bonnen withheld of 27 documents, Ex. C, Sen. Fallon withheld 25, Ex. D, Sen. Huffman withheld 16, Ex. E, Rep. Springer withheld 3, Ex. F, Rep. Noble withheld 6, Ex. G, and Rep. Swanson withheld 18, Ex. H. No privilege log was produced on behalf of Rep. Laudenberg. Indeed, all but four of the documents withheld were *not* authored by the Nonparty Legislators that have refused to produce them.[1,2]

**ARGUMENT**

[1] For example, 31 documents withheld by Sen. Bettencourt were drafted by chamber-wide legislative staffers, that is, employees of the Texas Legislature, generally; another 28 were authored by Sen. Bettencourt's personal staff. Accordingly, not one of the 59 documents withheld by Sen. Bettencourt seem to contain or reflect his personal "thoughts, opinions, and mental impressions," despite his assertion to the contrary. *See* Exs. B, J.

[2] On February 28, 2020, counsel for Nonparty Legislators turned over duplicate copies of one document previously withheld by Sen. Bettencourt and two documents previously withheld by Rep. Noble. Exs. I, J.

None of the documents withheld by Nonparty Legislators are subject to legislative privilege, to the extent any such privilege even exists for a state legislator in a case such as this. Even where recognized and applicable, any such privilege is exceptionally narrow and must be strictly construed.

## I. There is no federal common law privilege for state legislators.

As a preliminary matter, several courts have "rejected the notion that the common law immunity of state legislators gives rise to [any] general evidentiary privilege." *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D. N.Y.1997) (citations omitted); *see also Cano v. Davis*, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002) ("state legislators do not enjoy the type of absolute protection afforded members of the Congress under the Speech or Debate Clause"); *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) (same). Accordingly, it is far from clear that Nonparty Legislators enjoy any federal common law evidentiary privilege in the first instance.

## II. Even if the privilege exists, it is overcome by the federal interests at stake here.

Even if there were a federal common law evidentiary privilege that applied to state legislators, the Supreme Court has emphasized that, "where important federal interests are at stake, such as in the enforcement of federal criminal statutes, comity yields," whereby the federal interest supersedes any purported legislative privilege. *United States v. Gillock*, 445 U.S. 360, 373 (1980). And the federal government's interest in enforcing voting rights statutes is, without question, important. *See, e.g., U.S. v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) ("The federal interest in the present case is compelling. The Voting Rights Act forbids local practices that abridge the fundamental right to vote. This Act requires vigorous and searching federal enforcement.").

As the instant matter seeks to protect the fundamental right to vote and other Constitutional and otherwise-federally-protected rights, it raises precisely the type of federal interests that have

been consistently held to supersede any claims of legislative privilege by a state legislator. *Comm. for a Fair & Balanced Map*, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) ("Voting rights cases. . . seek to vindicate public rights. . . Thus . . . 'recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.'") (quoting *Gillock*, 445 U.S. at 373).

Indeed, courts have consistently held that the importance of voting rights cases, in particular, warrants especially broad disclosure by state actors *despite* any purported legislative privilege. *See, e.g.*, *Veasey v. Perry*, Civil Action No. 2:13-CV-193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014), *aff'd in part and rev'd in part*, 796 F.3d 487 (5th Cir. 2015) (requiring disclosure despite legislative privilege claims because the "interest in enforcing voting rights statutes is, without question, highly important"); *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574-75 (D. Md. 2017) (allowing discovery despite assertions of legislative privilege in redistricting case due to the "significance of the . . . interests at stake").[3]

Because the documents withheld by Nonparty Legislators are important to vindicating the fundamental right to vote in Texas, this Court should compel Nonparty Legislators to produce all documents at issue without exception.

## III. The privilege is inapplicable to the vast majority of documents withheld.

The Fifth Circuit has held that the legislative privilege is, at best, exceedingly narrow and

[3] *See also Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015) (allowing depositions of state legislators in case challenging the Tennessee Voter Identification Act despite invocation of legislative privilege); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100-103 (S.D. N.Y. 2003) (requiring discovery despite assertions of legislative privilege because redistricting case "raise[d] serious charges about the fairness and impartiality of some of the central institutions of our state government"); *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 154 (Fla. 2013) (legislative privilege must yield "where the violations alleged are of an explicit state constitutional provision prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting").

limited in its applicability. *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) ("[T]the legislative privilege for state lawmakers is, at best, one which is qualified," and one which "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.") (citation omitted); *see also Trammel v. United States*, 445 U.S. 40, 50 (1980) (same). And the quite limited "public good" exception simply does not apply here. To the contrary, discussed above, the public interest plainly favors disclosure.

***1. Legislative privilege does not apply to documents authored by non-legislators.***

*First*, the legislative privilege clearly does not apply to documents authored non-legislators, including such documents as those authored by the Texas Conservative Coalition. *See* Exs. G, C, J. These appear to be documents that were merely received by Rep. Noble and Rep. Bonnen, and therefore they cannot possibly contain what might even be arguably considered to be *their* deliberative thoughts and opinions on pending legislation. The assertion that these communications are somehow privileged simply because the Nonparty Legislators might agree with them, let alone on the basis that they have merely read or received them, is untenable. Indeed, counsel for Nonparty Legislators apparently concedes as much, having since produced documents apparently authored by Brandi Youngkin, the City Manager of Plano, and the Mexican American School Board Association, for exactly this reason. *See* Exs. I, J.

***2. Legislative privilege does not apply to documents shared with non-legislators.***

Second, it is well-established that the legislative privilege would not reach any meetings, discussions, or communications about the statutes at issue or their purported justifications with non-legislative or outside parties such as constituents, consultants, or other town or state entities

or officials. *See Bethune-Hill, v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (ordering production of "any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature").[4] Accordingly, the legislative privilege does not apply to the multiple correspondences between Sen. Bettencourt's staff and Austin Greisinger, for example, who appears to be a law fellow at the conservative Texas Public Policy Foundation. *See* Exs. B, J. Again, counsel for Nonparty Legislators apparently concedes as much, having produced emails from Sen. Bettencourt's staff sent to Ed Johnson, who Sen. Bettencourt appears to have previously hired as a political consultant despite his concurrent job in the Harris County voter registration office, for exactly this reason, *see* Exs. I, J, while continuing to withhold other documents that fall into precisely the same category.

***3. Legislative privilege does not extend to chamber-wide legislative aides or staffers.***

Similarly, courts have held that the legislative privilege does not apply to chamber-wide legislative aides and staffers. *See, e.g., Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 664 (E.D. Va. 2014) (applying the legislative privilege to "Assembly-wide staff member" would be "a bridge too far"): *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (legislative privilege does not apply to "legislative employees who provide information to legislators collectively, as, for example, technical employees of a standing committee, who do not advise a particular legislator as his or her personal

[4] *See* also *Page*, 15 F. Supp. 3d at 668 (denying legislative privilege to consultant independently contracted by partisan political party); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (ordering production of documents that "were communicated to or shared with non-legislative members"); *Comm. for a Fair & Balanced Map*, No. 11 C 5065, 2011 WL 4837508, at *10 ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."); *Perez v. Perry*, No. SA-11-CV-360-OLG, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (same).

staff"); *see also Bethune-Hill*, 114 F. Supp. 3d at 343 ("The privilege only protects 'integral steps' in the legislative process and does not extend to commentary or analysis following the legislation's enactment."). Accordingly, the legislative privilege does not apply to the 31 documents withheld by Sen. Bettencourt, Exs. B, J, the 16 documents withheld by Rep. Bonnen, Exs. C, J, the 20 documents withheld by Sen. Fallon, Exs. D, J, the 10 documents withheld by Sen. Huffman, Exs. E, J, all 3 of the documents withheld by Rep. Springer, Exs. F, J, or the 13 documents withheld by Rep. Swanson, all of which were authored by chamber-wide "Legislative Staff" or "Legislative Staffers."

***4. The legislative privilege does not automatically apply to staff of individual legislators.***

Similarly, the legislative privilege also does not automatically extend to the personal legislative staff of individual Nonparty Legislators. Indeed, the state legislative privilege extends only to materials reflecting "integral steps in the legislative process," *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (5th Cir. 2011), and does not even apply to documents drafted by legislators themselves unless they are deliberative, rather than factual in nature. Substantively, the privilege is limited to "those things generally done in a session of the House by one of its members in relation to the business before it . . . as a representative, in the exercise of the functions of that office." *United States v. Brewster*, 408 U.S. 501, 512-13 (1972); *see also Doe v. McMillan*, 412 U.S. 306, 313 (1973) ("Everything a Member of [the legislature] may regularly do is *not* a legislative act within the protection of the" privilege) (emphasis added).

For example, the privilege does not extend to "preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* at 512. "Although these are entirely legitimate activities, they are political in nature rather than legislative," and hence not covered by the privilege. *Id.* In addition, even records regarding legislative activities are

outside the privilege if they reflect only facts, not legislators' subjective thoughts and opinions.[5] At the very least, there is no credible argument that the legislative privilege should apply to the "*personal* calendar entries" of someone on Rep. Bonnen's Staff. *See* Exs. C, J. And unless Nonparty Legislators can establish that their staff members were acting essentially in the role of the Nonparty Legislators themselves with regard to the other communications or documents withheld, the Court should order all such documents produced.

***5. Legislative privilege does not apply to documents created after May 24, 2019.***

The legislative privilege does not apply to any documents created after May 22, 2019 by members of the Texas House, or after May 24, 2019 for documents by members of the Texas Senate, the dates on which each chamber signed and approved HB 1888 and, therefore, after which time members of either chamber not possibly have been engaged in the type of legislative deliberations that the common-law legislative privilege might arguably protect. *See Gravel*, 408 U.S. at 626 (1972) (questioning regarding private publication appropriate because it occurred after deliberations and therefore was "not part and parcel of the legislative process"). Despite that the legislative privilege does not apply, Sen. Bettencourt has withheld two documents created on January 10, 2020, and all three of the documents withheld by Rep. Springer were "generated" on January 29, 2020. *See* Exs. B, F, J. Accordingly, they should be produced.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court order the Nonparty Legislators to produce all documents identified in their respective privilege logs, which have been improperly withheld on the basis of legislative privilege.

[5] *In re Grand Jury*, 821 F.2d at 959 (privilege extends only to "opinions, recommendations or advice about legislative decisions"); *Doe*, 788 F. Supp. 2d at 985 (same).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 2, 2020, I electronically served the foregoing Motion via ECF on all counsel of record, and I further served the foregoing Motion on counsel for Nonparty Legislators via electronic mail.

/s/ *Kevin J. Hamilton*
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